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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION.

No. 245

THE CITY OF GREENVILLE ET AL., APPELLANTS,

vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF THE SOUTH CAROLINA TAX COMMISSION.

ARGUMENT OF APPELLANTS' COUNSEL.

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ARGUMENT OF APPELLANTS' COUNSEL.

These actions were brought, one by a manufacturing plant chartered under and doing business under the

laws of the State of South Carolina, and the other by various municipal corporations of the State of South Carolina, in the original jurisdiction of the Supreme Court of South Carolina against the members of the Tax Commission, for the purpose of securing an injunction against the enforcement of a tax levied by the so-called Gasoline Tax Act of 1930 of the State of South Carolina. This Act is set out in full at pages 5-8 of the Record in Case Number 245. The present appellants sought the injunction before the Supreme Court of South Carolina upon the ground that the Statute in question was repugnant both to the Constitution of said State, and also to the Commerce and the Equal Protection Clauses of the Federal Constitution. The Supreme Court of South Carolina held the Statute to be constitutional against all attacks, and this is a direct appeal from the final judgment of the Supreme Court of South Carolina, which definitely and finally levies the tax against the appellants.

By this appeal, appellants bring the Federal questions before this Court, submitting in effect,

(1) That the Act in question is repugnant to the Commerce Clause of the Federal Constitution, in that it makes the Interstate origin of the gasoline in question the basis of the classification in the imposition of the tax; and

(2) That it levies a tax on gasoline bought outright by the plaintiff before its shipment in Interstate Commerce, and not thereafter sold within the State; and

(3) That the Act is repugnant both to the Commerce Clause and the Equal Protection Clause of the Federal

Constitution, in that it discriminates against gasoline produced by other states, and places a tax only upon citizens of this State who import and store such gasoline; and

(4) That the tax is a license tax, and that it makes the act of storing the gasoline within the State, *and* its importation in Interstate Commerce, the joint acts which give rise to the license tax imposed, thereby placing a tax on Interstate Commerce.

There are other incidental questions presented by the appeal which will hereinafter be adverted to. The Supreme Court of South Carolina held the Statute to be constitutional in itself; and also held that in considering its constitutionality, resort might be had to the provision of the two other gasoline tax acts of South Carolina (Act No. 34 of 1925, and Act No. 102 of 1929); and that they complemented the Act in question, and in reality presented a state-wide policy of taxing and reaching the consumer of every gallon of gasoline consumed within the State of South Carolina.

We ask to consider first, the question of the constitutionality of the Gasoline Tax Act of 1930 in itself, and secondly, the question of whether or not if it be unconstitutional in itself, it may be complemented and bolstered up by the existence of other acts.

Of course, only the Federal questions are brought to this Court.

The Facts.

The complaints and various stipulations of counsel constitute an agreed statement of facts and may be in-

spected by the Court for the purpose of authoritatively ascertaining the facts.

Briefly stated, the facts are that the Gregg Dyeing Company operates a bleachery at Graniteville, S. C., and uses gasoline in the process of manufacture. It and some other bleacheries in South Carolina buy gasoline in car loads, buying the same outright, usually in Texas, and having the same shipped in, in tank cars, to their manufacturing plants in South Carolina. They store the same and gradually use the gasoline in the manufacture of their goods. The Cities and Counties involved likewise purchase and import in Interstate Commerce, and store for more than twenty-four hours, with intention to use the same in its fire engines, motor trucks, and other agencies, large quantities of gasoline. Until the Gasoline Tax Act of 1930 was passed the Tax Commission of South Carolina had ruled that gasoline so imported was not taxable under any existing license tax law. Hence, it is to be definitely concluded that the Act was passed for the purpose of reaching gasoline brought in, in Interstate Commerce.

The two other Gasoline Tax Acts of the State of South Carolina referred to hereinbefore, plainly levy a license tax of six cents a gallon graduated in accordance with Section 1, Article X of the State Constitution of South Carolina, upon the business of selling gasoline within the State of South Carolina.

The Record reveals the fact that there is a large refinery in South Carolina owned and operated by the Standard Oil Company, where gasoline is manufactured from crude oil; that much of said gasoline is stored in South Carolina and later sold in this state,

and a tax is paid on the sale, but not on the storage; and that much of said gasoline so manufactured in South Carolina and stored temporarily therein, and then shipped out of the state for sale in other states, is not taxed at all.

It is further to be noted that the Gasoline Tax Act of 1930 carefully avoids placing a tax on all gasoline *stored* in South Carolina. It singles out only that which is imported in Interstate Commerce. All of the Acts avoid putting a tax on all consumers of gasoline, for the obvious reason that it would be difficult to collect the tax from every automobile owner. In addition, it is a fact that such gasoline as is brought into the state in trucks (say) and used within twenty-four hours, is not taxed at all. In border counties this could be a considerable amount.

With this situation before it, the Supreme Court of South Carolina swept aside all constitutional objections to the Act of 1930, and in addition held that the Acts of 1925 and 1929 complemented the Act of 1930 if it were unconstitutional.

Opposed to the decision of the majority of the Court is the cogent reasoning of Justice Cothran (R. Gregg Case, page 37):

> "It is clear from the terms of the Act of 1930 that it applies exclusively to importations 'from any other State or foreign country,' which constitute, as recognized by the Act, 'Interstate Commerce.' It is alleged in the complaint and admitted by the demurrer, that gasoline is manufactured from the raw product in South Carolina; the Act has no application to it; neces-

sarily it is a discrimination against Interstate Commerce. The fact, if it be a fact that the tax is being collected from such manufacturers in this State, does not alter the situation; they are not required under the Act to pay it while in storage."

ARGUMENT.

Several preliminary matters may first be referred to:

(*a*) The fact that an injunction is proper on the ground of inadequacy of the remedy at law if the proposed tax is illegal is fully established by the decisions of this Court in *Ware Shoals* v. *Jones*, 78 S. C. 211, and *Western Union* v. *Tax Commssion*, 144 S. C. 234, and in the decision of the United States Supreme Court in *Dawson* v. *Kentucky*, 255 U. S. 288; there being no provision in the Gasoline Tax Act of 1930 allowing the tax to be paid under protest and to be recovered by action in the Court of Common Pleas.

(*b*) It is to be noted that the Act in question provides that the gasoline shall be taxed "after the same has lost its interstate character as a shipment in Interstate Commerce." As to this generality, we wish to point out that in *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421, it is ruled by the Supreme Court of the United States specifically, that automobiles brought into a state from another state, do not lose their interstate characer as long as they are in the hands of the original importer; in *Sonneborn* v. *Cureton*, 262 U. S. 513, the "original package" doctrine was abandoned; and in *Darnell* v. *Memphis*, 208 U. S. 113, it is held that goods which are taxed because they

have been brought in from another state, cannot be taxed on the ground that they have lost their interstate character. Also see *Cooley on Taxation*, Sec. 407, hereinafter quoted. This question is treated of incidentally throughout the argument, and really permeates the whole consideration.

(*c*) Something was said in the argument below about the motive of the appellants and their effort to evade a just tax. To begin with, this Court has held that the motive of the taxpayer is immaterial. The question is the legality of the tax. *Oil Company* v. *Mississippi*, 74 L. Ed. 320. The motive of the municipality is to save taxation for the citizens of such cities. The reasoning of the Gregg Company, while the same does not present a legal ground, is the very human idea that as its gasoline is not used on the roads that unless it be legally bound so to do, that it should not be forced through a gasoline tax to keep up the roads, but that this burden should be placed on the automobilist who daily uses the roads.

(*d*) The Supreme Court of Florida, in *Sheip* v. *Amos*, 130 So. 699, has quite recently held a statute similar to the South Carolina Act to be constitutional. This decision is, of course, no more authoritative than that of the Supreme Court of South Carolina.

We will then pass to the constitutional questions.

Does the Gasoline Tax Act of 1930 Burden Interstate Commerce?

The undoubted general rule is that under the Commerce Clause of the Federal Constitution (Article I,

Section 8, Clause 3) no tax, whether a property tax or a license tax, can be levied which will burden Interstate Commerce.

Telephone Company v. *State Board*, 73 L. Ed. 145.
Helson v. *Kentucky*, 279 U. S. 249.
Standard Oil Company v. *Graves*, 249 U. S. 389.
Coe v. *Errol*, 116 U. S. 27.

It is to be noted that it is alleged in the complaint that Interstate Commerce is a subject upon which Congress has legislated. In any event the imposition of a property tax or a license tax upon Interstate Commerce would be unconstitutional.

Missouri v. *Kansas Gasoline Co.*, 256 U. S. 309.

The following line of recent decisions of the United States Supreme Court involves the question of the taxing of Interstate importations of gasoline or oils and are appropriately conclusive, we submit, of the exact question involved in this case; and their consideration renders a complete survey of the field of the law of Interstate Commerce unnecessary. These decisions are:

Standard Oil Co. v. *Graves*, 249 U. S. 389.
Askren v. *Continental Oil Co.*, 252 U. S. 444.
Bowman v. *Oil Company*, 256 U. S. 646.
Texas Company v. *Brown*, 258 U. S. 470.
Sonneborn v. *Cureton*, 262 U. S. 513.
Hart Refineries v. *Harmon*, 278 U. S. 499.
Breece Lumber Company v. *Marabel*, — U. S. —.

This line of decisions, after first indicating that the old idea of the law of the *original package* would be applicable to gasoline, and that no gasoline could be taxed which, after its importation into South Carolina (say), was sold in its original package, changed the rule completely in the case of *Sonneborn* v. *Cureton*, 262 U. S. 513. In that case, which alone needs to be closely considered herein, the Court abandoned the "original package" rule and substituted a new rule or set of rules, which fact is deduced from the words of the Court itself hereinafter set out.

The crux of this matter is the question of whether the majority opinion of the Supreme Court of South Carolina placed the proper construction upon the Sonneborn decision as applying to the facts of this case, or whether Justice Cothran in his dissenting opinion properly construed that decision of this Court. We earnestly submit that Judge Cothran's construction of the Sonneborn decision was the correct one.

The majority decision of the Supreme Court of South Carolina in discussing the Sonneborn decision (R. Gregg Case, pp. 25-27), referring to the Gregg Company, says:

> "The gasoline is delivered at its plant in Aiken in these 'original packages,' and upon delivery it is transferred from the 'original packages' to its own tanks and stored for future use * * *, and has become at rest as a part of the general mass of property in this state * * *. Its immunity from State taxation is then at an end."

Then the majority of the Court sweeps aside all else that is in the Sonneborn decision, and holds that as the

sale of the oil in that case could be taxed after its original packages had been broken and it had come to rest, that likewise the storage of gasoline brought into South Carolina by the Gregg Company for its own use could be taxed *for its storage, although no other gasoline in South Carolina is taxed for its storage.* Thus the majority of the Court disposes of the Commerce Clause and of the Interstate question.

Judge Cothran, on the other hand (R. 36), held that the Sonneborn case has abrogated, as the decisive test, the original package rule; and by his quotation from the Sonneborn decision, made plain that he held that the test was that, the sale of gasoline after it had come to rest, whether "*in the original package or not,*" would be legal "if the state law levied the same tax on all oil and all sales of it without regard to origin." Then Judge Cothran quoted the following decisive language from the Sonneborn decision:

> "A state tax upon merchandise brought in from another state or upon its sale, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is *not discriminating in its incidence against the merchandise because of its origin in another state.*" (Italics added.)

In the Sonneborn case, all sales of oil in Texas were taxed. Various classes of sales were involved. Two classes, as stated by the Court (262 U. S. 509), were—

> "(1) Those from the sale of oil which, when sold, was not in Texas * * *;

> "(2) Those arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in unbroken packages."

The first class of oil referred to is entirely similar to the gasoline imported by the appellants in the instant cases, which is gasoline purchased outright before it is shipped into the State of South Carolina, and as to which the appellants have made no use whatsoever up to the time that it is taxed. As to this first class of oil which is in the same situation as the gasoline in the instant cases, the Supreme Court of the United States said:

> "Many of the sales by the appellants were made by them *before the oil to fulfill the sales was sent to Texas. These were properly trected by the state authorities as exempt from state taxation.* They were in effect contracts for the sale and delivery of *the oil across state lines.* The soliciting of orders for such sales is equally exempt. *Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it.* Robbins *v.* Shelby County Taxing District, 120 U. S. 489. Asher *v.* Texas, 128 U. S. 129; Stoutenburgh *v.* Hennick, 129 U. S. 141; Caldwell *v.* North Carolina, 187 U. S. 622; Rearick *v.* Pennsylvania, 203 U. S. 507; Brennan *v.* Titusville, 153 U. S. 289; Dozier *v.* Alabama, 218 U. S. 124; Crenshaw *v.* Arkansas, 227 U. S. 389; Stewart *v.* Michigan, 232 U. S. 665; Western Oil Refining Co. *v.* Lipscomb, 244 U. S. 346. * * *." (Italics added.)

The main question involved in the Sonneborn case was as to oil sold in its original packages *after it had*

been brought into the State of Texas. The contention of the oil company was, that as it was sold in the original package, that the State could not tax it. The Court with great care reviewed all of the original package cases and determined that in justice they must apply to foreign imports alone, and not to commerce between the states; and the Court entirely abrogated the original package doctrine as to interstate shipments, which the Supreme Court of South Carolina continues to adhere to in its decision in the Gregg case. In lieu of the original package idea, we submit that the Court promulgated the rule set out in the foregoing excerpt as covering goods purchased outright before their shipment into a state in Interstate Commerce; and then as to all goods brought in, in Interstate Commerce, and sold after they reached the state of their purchaser, this Court promulgated the rule enunciated in the following language:

> "A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and *is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state.* This distinction is illustrated in the difference between those cases which uphold the validity of a tax upon peddlers engaged in selling merchandise from out of the State which they carry with them, like those of Machine Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 U. S. 296; Baccus *v.* Louisiana, 232 U. S. 334; and Wagner *v.* Covington, 251 U. S. 95, on the one hand, and that

> of Welton *v.* Missouri, 91 U. S. 275, in which a peddler's tax was held bad because it was levied only on goods from other states, on the other. Ward *v.* Maryland, 12 Wall. 418, 429; Guy *v.* Baltimore, 100 U. S. 434, 443, 444; Tiernan *v.* Rinker, 102 U. S. 123, Webber *v.* Virginia, 103 U. S. 344, 350, and Walling *v.* Michigan, 116 U. S. 446, are other instances showing the invalidity of state tax laws discriminating against merchandise brought in from other states." (Italics added.)

From the foregoing quotations from the Sonneborn decision of the Supreme Court, in a case which was meant sedately and authoritatively to settle the question of the taxing of gasoline imported into a state, we submit that the new rule or rules may be deduced, to-wit:

(1) The original package idea and the idea of the goods "coming to rest" in the state into which they have been imported, as the decisive test, has been discarded.

(2) A tax may never be levied upon goods definitely bought before their interstate importation (of course, unless they are resold in the state into which they are imported; or unless the *use* of all such articles within the state is taxed, regardless of their origin).

(3) A tax of any kind which makes the *interstate origin* of the goods the basis of the classification upon which the license tax is based, is clearly unconstitutional.

The deductions and conclusions just set out as drawn from the *Sonneborn case*, are confirmed in the last case upon the subject (*Hart Refineries* v. *Harmon, supra*) in which the converse of the situation arising in the instant case, was presented to this Court. In the Hart case, the State of Montana had passed an Act *taxing all sales of gasoline made within the State of Montana.* The Montana Refineries objected that the tax discriminated against them "because it was not extended to include gasoline shipped from other States and consumed or used after it had come to rest in Montana, and its status in Interstate Commerce had ended." This Court construed the Sonneborn decision, holding that while it meant that a state might lay a tax on the *use* of gasoline as well as on its *sale*, that still *if every sale made in Montana is taxed*, that the fact that the statute failed to tax the *use* of gasoline imported in Interstate Commerce for use, as in the present case, did not constitute a discrimination.

The Hart decision is entirely confirmatory of Justice Cothran's dissent herein. In the present case the storage on all gasoline in the State of South Carolina with intent to use it is not taxed by the Gasoline Tax Act of 1930. The Act taxes only gasoline which has been imported, in Interstate Commerce. In the Hart case this Court specifically held that such a tax was constitutional only, "*if laid on the commodity generally without regard to its origin,*" and provided "*it does not discriminate against the commodity because of its origin in another state.*"

It is submitted that the Gasoline Tax Act of 1930 embodies both of the vices noted.

It is submitted that the Gasoline Tax Act of 1930 is unconstitutional and is repugnant to the Commerce Clause of the Constitution of the United States, both because it purports to tax gasoline which has been bought outright before it has been shipped into the State in Interstate Commerce, and before any use or sale of it, is made in South Carolina, and particularly because it purports to tax no gasoline except that which has been shipped in, in Interstate Commerce. In other words, it makes the basis of the classification for taxation, the Interstate origin of the gasoline taxed.

We submit that Justice Cothran's dissenting opinion was correct.

Gasoline Tax Act of 1930 Repugnant to Both Commerce Clause and Equal Protection Clause, in That It Discriminates Against Gasoline Produced by Other States and Places License Tax Only Upon Citizens of This State Who Import and Store Such Gasoline.

In so far as the Commerce Clause is concerned, this contention is closely akin to the consideration already presented, but does present the question from a different angle. Our contention applies with especial cogency to the State of South Carolina in which gasoline is actually produced.

The law upon the subject and the distinction between the operation in this regard, of the Commerce Clause and of the Equal Protection Clause of the Fourteenth Amendment, is made clear from a consideration of the

case of *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421.

In that case the State of North Carolina had passed an Act levying a tax to be paid by any person or corporation selling "automobiles in this State, the manufacturer of which has not paid the annual license tax provided in this section," and further providing that four-fifths of said tax should be remitted in case the person or corporation had invested in the State "at least three-fourths of the entire assets of the said manufacturer of automobiles."

The plaintiffs who manufactured automobiles in Pennsylvania and Indiana raised the objection that the Statute was repugnant both to the Equal Protection Clause of the Fourteenth Amendment and to the Commerce Clause of the Federal Constitution.

As to the Equal Protection Clause, this Court ruled in the following language:

> "If the Pennsylvania Corporation and the Indiana Corporation * * * are doing business in the State and therefore within its jurisdiction, they undoubtedly *can complain of a discrimination against them that is offensive to the Fourteenth Amendment. Southern Railway Company* v. *Green*, 216 U. S. 400-415." (Italics added.)

This Court then referred to the discriminating condition set out in the Taxing Statute which gave immunity to the extent of four-fifths of the tax to automobile manufacturers who invested three-fourths of their entire assets in the State of North Carolina.

The Court ruled:

> "The condition can be satisfied by a resident manufacturer, his factory and his products in the first instance being within the State; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the State. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the State."

From the foregoing, it appears perfectly plainly, we submit, that a corporation of the State of South Carolina doing business in the State of South Carolina, such as the Gregg Dyeing Company, plaintiff herein, may not be discriminated against because it buys its gasoline from another state, while other citizens of the state and other bleacheries who buy gasoline locally are not subject to the tax provided by the Gasoline Tax Act of 1930.

As to the Commerce Clause of the Constitution involved in the same case, this Court in the *Bethlehem Motors Company* case said:

> "Their second contention is that the Act is an attempt to regulate Interstate Commerce. If it have that effect it is illegal, for a tax on an agent of a foreign corporation for the sale of a product is a tax on the produce, and, if the product be that of another State, it is a tax on commerce between the States. *Welton* v. *Missouri*, 90 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344; *Darnell & Sons Co.* v. *Memphis*, 208 U. S. 113. This is the assertion of plaintiffs in

> error; defendants in error oppose a denial to the assertion and the denial is supported by the Supreme Court on the authority of *Brown* v. *Houston*, 114 U. S. 622; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304. The basis of the denial and its support by the Supreme Court is that the automobiles had passed out of Interstate Commerce *and had reached repose in the State* and become blended with the other things of the State, and become subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the Court that the automobiles were in the hands of the agents of the consigning corporations, *and therefore a tax against them was practically a tax on their importations into the State.*" (Italics added.)

The question of discrimination, as against the Equal Protection Clause of the Fourteenth Amendment in gasoline cases, was before this Court in *Hart Refineries* v. *Harmon, supra.* In that case the refineries complained that they were discriminated against because the tax reached only the sale of gasoline in the State of Montana, and because those who imported gasoline in Interstate Commerce and used it without buying it in Montana were not subject to the same tax. This Court ruled that inasmuch as all persons within the State who *sold* gasoline were taxed, that there was no discrimination. The Court, discussing the Equal Protection Clause of the Fourteenth Amendment, said:

> "That clause does not prohibit classification; and the power of the State to classify for the

> purpose of taxation is a wide range in flexibility, provided that the classification rests upon a substantial difference *so that all persons similarly circumstanced will be treated alike.* It is enough if all of the same class *are included and treated alike.*" (Italics added.)

Our contention is that there are myriads of persons in the State of South Carolina who *store with the intent to use in their businesses,* gasoline. The Gasoline Tax Act of 1930 places the tax therein levied only upon those who acquire the gasoline which they do store with the intent to use in their businesses, from other states than South Carolina.

As to the Commerce Clause, in addition to the *Bethlehem case,* the following authorities directly rule that to levy a tax upon products of sister states is violative of the Commerce Clause of the Federal Constitution.

Darnell v. *Memphis,* 208 U. S. 113:

In this case a tax was levied on logs which had been brought into the State of Tennessee, no similar tax being levied on logs produced within the State of Tennessee. The Supreme Court of the United States ruled:

> "The Court in its opinion conceded that the property embraced in the assessment complained of was purchased by the complainant in and brought from other states, or consisted of lumber produced from logs so brought into Tennessee, and that property of like character would not be subject to taxation under the state law if it had been produced from the soil of Tennessee.

"As a prelude to a review of the cases referred to we observe that while it is undoubted that it has been settled that where property which has moved in the channels of Interstate Commerce is at rest within a state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon Interstate Commerec, *that doctrine * * * has always expressly excluded the conception that a State could, without* directly burdening Interstate Commerce, *discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.*

"The leading cases announcing the doctrine that a state may tax property which had moved in the channels of Interstate Commerce, when such property had become at rest therein, even before the sale in the original package, are *Woodruff* v. *Parham*, 8 Wall. 123, and *Brown* v. *Houston*, 114 U. S. 622. But in both those cases it was sedulously pointed out that the power which was thus recognized, *did not, and could not, include the authority to burden the property brought from another State with a discriminating tax.* In *American Steel Wire Co.* v. *Speed*, 192 U. S. 500, 519, where the doctrine of *Woodruff* v. *Parham* and *Brown* v. *Houston* was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon Interstate Commerce, property so situated must be taxed '*without discrimination, like other property situated within the State.*'" (Italics added.)

After a review of the authorities, the Court concluded:

> "As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the Court below sustained, was a direct burden upon Interstate Commerce since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the State of Tennessee by exempting like property when produced from the soil of Tennessee, it follows that the Court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the Equal Protection Clause of the Fourteenth Amendment."

Boyce v. *French*, 293 Fed. 43:

In this case a tax was levied on dealers in seeds which had been imported into the State of Washington. No similar tax was levied on dealers of seeds produced within the State of Washington.

The Court said:

> "This discrimination against the seeds of other States, in its essence, places an unwarranted burden upon Interstate Commerce, and a Statute imposing such burden cannot be upheld under Article I, Section 8, Subsection 3 of the Constitution of the United States, granting Congress power to regulate commerce with the foreign nations and among the several states, and with the Indian Tribes."

Cooley on Taxation, Sections 406-7:

> "SECTION 406. It is a violation of the commerce clause to discriminate in taxation in favor of home products and against products and manufacturers of other states or foreign countries. In other words, a *commodity cannot be taxed because of the fact that it has been transported from another state;* since the exclusive power of Congress to regulate Interstate Commerce 'continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. The power protects it, even after it has entered the state, *from any burdens imposed by reason of its foreign origin.*'" (Italics added.)
>
> "SECTION 407. A privilege tax on a dealer in goods shipped into the state from a sister state, simply because the goods were shipped from another state, is practically a tax on the goods themselves and is invalid as a discrimination in violation of the commerce clauses; and *it is immaterial that the goods had come to a rest within the state, and were held in storage for sale to retail dealers from time to time.*" (Italics added.)

Hence, it is submitted that inasmuch as the tax imposed by the Gasoline Act of 1930 clearly discriminates against the plaintiff which uses gasoline imported in Interstate Commerce while those buying gasoline elsewhere are not subjected to the tax levied by said Act; and as said Act discriminates against the products of sister states, that said Act is repugnant both to the Fourteenth Amendment and to the Commerce Clause of the Constitution.

This is especially true in South Carolina where gasoline is produced. It is pointed out in *Texas Company* v. *Brown*, 258 U. S. at 476, that Georgia, in which state that case arose, and New Mexico, in which the *Askren* and the *Bowman cases* arose, *produce no gasoline whatsoever. South Carolina does produce gasoline.* The Standard Oil Company has a large refinery in Charleston County, produces much gasoline, some of which it sells, and all of which it stores for more than twenty-four hours.

We submit, in the light of this fact, that the Gasoline Tax Act of 1930 becomes clearly repugnant to both the Equal Protection Clause and the Commerce Clause of the Federal Constitution. It attempts to tax plaintiff in its storage of gasoline, whereas the Standard Oil Company pays no storage tax upon its gasoline which it produces, stores, and uses in South Carolina, and myriads of other businesses which buy gasoline from South Carolina dealers *pay no storage license tax.*

An additional consideration of great importance, we submit, lies in the decisions to the effect that a tax, whether license or excise, may not be levying upon the holding (storing) of *one's own property.* The Act of 1930 purports to tax interstate importation and storage. We set out the authorities and submit that if holding and storing one's own property is illegal, that then all that is left in the Act is an attempt to tax Interstate Commerce pure and simple.

We cite the following authorities:

Cooley on Taxation, Section 1676, page 3382:

> "A tax levied by reason of ownership of property is said to be a tax on the property rather than an occupation tax, and it is also held that a tax on the right of ownership on a thing is a tax on the thing itself. The *mere right to own or hold* property cannot be made the subject of excise tax." (Italics added.)

In re Opinion of Justice, 84 N. E. 499:

In the State of Massachusetts the practice allows the Legislature to submit the constitutionality of proposed legislation to the Supreme Court of the State in advance of the passage of said acts. In the volume and page above stated, there appears the answer of the Supreme Court for Massachusetts to an inquiry as to the constitutionality of various proposed taxes. Amongst the inquiries is the constitutionality of a proposed act taking the ownership and the holding of property under ownership. The Supreme Court of Massachusetts, in disposing of this question, answered directly:

> "The mere right *to own and hold property* such as is referred to in the question, cannot be made the subject of an excise tax." (Italics added.)

The property referred to was money in hand, stocks, bonds and securities.

Freiberg v. *Dawson*, 274 Fed. 420-434:

The property in question in this litigation was whisky. The Circuit Court of Appeals ruled:

"The principles which limit the definition of a permissible excise tax are discussed in the familiar textbooks and digest, and, among many instances, by Chief Justice Fuller in *Pollock* v. *Farmers' Co.*, 157 U. S. 429, 580, 15 Sup. Ct. 673, 39 L. Ed. 759, *et seq.*, and by Judge O'Rear, for the Kentucky Court of Appeals, in *Standard Oil Company* v. *Commonwealth*, 119 Ky. 75, 79-81, 82 S. W. 1020. The controlling proposition is that the mere right *to own and hold property cannot be made the subject of excise.* The principle has been applied, for example, to the mere owning of timber (*Thompson* v. *Kreutzer*, 112 Miss. 165, 72 South. 891), and to devoting it to a turpentine orchard, the use for which it was most available (*Thompson* v. *McLeod*, 112 Miss., 383, 73 South. 193 L. R. A. 1918-C, 893 Ann. Cas. 1918-A, 674."

Should the tax be a property tax (*Dawson* v. *Kentucky Distilleries*, 255 U. S. 288) the ruling of the Supreme Court of South Carolina to the contrary notwithstanding, then it is discriminatory in that it levies a tax of forty-eight per cent, whereas the property tax in South Carolina is forty-seven mills on the dollar. This matter is the subject of appellants' thirteenth assignment of error. We submit, under the *Dawson case*, that the tax is a property tax.

The Supreme Court of South Carolina further seeks to sustain the Acts of 1930, because it taxes the storage of inflammable materials. Even if such a general doctrine is to be given approval, then the Act of 1930 clearly falls because it does not tax the storage of all inflammable material, nor even the storage of all gaso-

line in South Carolina, but only the storage of such gasoline as has been imported in Interstate Commerce.

The Tax is Unconstitutional as a License Tax Because It Taxes Both Interstate Importation and Storage Within the State.

The Act of 1930 in its title and throughout its entire body denominates itself as a license tax. If it is sustainable at all, it is on the business of storing one's own gasoline. The Supreme Court of South Carolina (R. Gregg Case, p. 33) said in effect that, it had not time nor opportunity to explore into the origin of excise taxation, but that it thought this was an excise and not a license tax. We submit, on the authority of Cooley on Taxation, Section 1673, that the term "excise tax" is a generic term which is divided into many subdivisions. Mr. Cooley gives as subdivisions, license taxes, corporate franchise taxes, sales, inheritance, documentary stamp taxes, etc. Hence, the Act of 1930 can be an excise tax and at the same time a license tax. Such its authors termed it throughout, and such it has every earmark of being. It is *graduated* at so much per gallon, as is required by Section I, Article X of the Constitution of South Carolina.

This Court will judge of its nature despite the holding of the South Carolina Court (*New Jersey Bell Telephone Company* v. *State Board,* 74 L. Ed. —; *Storaasli* v. *Minnesota,* 75 L. Ed. 485.

If the Act imposes a License Tax, we submit it is clearly unconstitutional as placing a License Tax on Interstate Commerce and storage. The Act provides:

> "Every person, firm, and corporation * * * which shall import into this State from any other State or foreign country, or shall receive by any means into this State, AND keep in storage in this State for a period of twenty-four hours or more * * * any gasoline."

Hence, it clearly appears that what the license tax in question is laid upon is two acts, the concurrence of both of which is necessary to the placing of the tax, namely,

> (1) The importation of the gasoline in Interstate Commerce, AND
>
> (2) Storing said gasoline within the State of South Carolina for a period of twenty-four hours with the intent to use and consume it.

We submit that the decisions of this Court clearly hold that an act that does this is repugnant to the Commerce Clause of the Federal Constitution.

We cite:

Bowman v. *Continental Oil Co.*, 256 U. S. 646.
Leloup v. *Port of Mobile*, 127 U. S. 641.
Crutcher v. *Kentucky*, 141 U. S. 47.
Williams v. *Talladega*, 226 U. S. 404.

In the *Bowman case*, the Court said:

> "*The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately;* and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construc-

> tion, the provisions of the Act in respect of this tax are not capable of separations *so as to confine them to domestic trade,* leaving interstate commerce exempt. United States *v.* Reese, 92 U. S. 214, 221; Trade-Mark Cases, 100 U. S. 82, 99; Poindexter *v.* Greenhow, 114 U. S. 270, 304-305."

The *Leloup case, supra,* and the *Talladega case, supra,* both involve City Ordinances placing license taxes on telegraph companies doing business in said municipalities. In the earlier case, the *Leloup case,* the ordinance baldly placed a license tax on telegraph companies doing business in the municipality in question. This Court ruled that the license tax was inseparable, and that as it had the effect of taxing interstate business as well as intrastate business, that the whole license tax being indivisible, must fall, as it became repugnant to the Commerce Clause of the Federal Constitution.

In the *Talladega case* the ordinance as drawn excepted interstate business but failed to except governmental business, that is to say, telegrams sent from and into Talladega by agents of the Federal Government. This Court ruled that as the license tax in question in reality would cover governmental business as well as intrastate business, although interstate business was excepted, that the license was indivisible, and that it was repugnant to the Commerce Clause.

If the Statute Within Itself is Repugnant to the Federal Constitution, Can Other Statutes Be Read Into It, Complement It, and Bolster Up Its Constitutionality?

It will be recalled that the Statutes of 1925 and 1929 of South Carolina provide, in effect, that oil companies selling gasoline shall pay a tax of six cents a gallon for each gallon so sold; that the Act of 1930 provides that whoever imports in Interstate Commerce and stores for more than twenty-four hours, with intention to use, gasoline, shall pay a similar tax, and that there is no uniform act placing a tax on all who store gasoline, nor on all who consume gasoline within the State of South Carolina. It will further be recalled that importers, who bring gasoline into the State from sister states, in trucks for instance, and use the same within twenty-four hours, are not taxed at all; and that all of the gasoline which is manufactured by the Standard Oil Company in their refinery in Charleston, and is there stored and later shipped beyond the limits of the State, is in no fashion taxed. Nevertheless, the Supreme Court of South Carolina, referring to the Gasoline Tax Act of 1930, ruled:

> "The Act in question may be said to be complementary to the other statutes of the State under which are assessed a gallonage tax on gasoline and other petroleum products. * * * Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in the State of South Carolina pay a tax of six cents per gallon, no matter what the

> origin of, or State in which, the gasoline is produced."

The position is that the Acts combined place upon the consumer of all gasoline in South Carolina a uniform tax of six cents a gallon, and that in *testing the constitutionality* of the Act of 1930, which taxes importation in Interstate Commerce and storage with intent to use, that the Sales Acts of 1925 and 1929 may be read into the Act of 1930, although it refers to the other acts only by way of exclusion.

In opposition to this position, we submit:

(1) The idea invoked by the Supreme Court of South Carolina, that from a legal standpoint, the tax is necessarily passed, as matter of law, on to the consumer, and can be deemed paid by him in considering the constitutionality of the question, is based upon a mere *obiter* by Justice Pitney in *Texas* v. *Brown* (258 U. S. 466) to the effect that the Legislature of Georgia in the Act then under review, intended the tax to fall on the consumer.

In the very recent case of *Panhandle Oil Company* v. *Knox*, 277 U. S. 218, this Court, reviewing a similar situation, did not baldly say that the tax as a matter of law fell upon the consumer, but placed the matter upon a much sounder basis, saying:

> "To use the number of gallons sold the United States as a measure of the privilege tax, is, in substance and effect, to tax the sale."

The holding of this Court therein, we submit, was that the Act in question became a sales tax because

the gallonage was used as a basis, and there was no legal holding that as matter of law the payment of the tax was passed on to the consumer in such manner as to affect the constitutionality of the Statute. (It is also interesting to note that the very statute in question—see p. 220—specifically excepted from the tax gasoline brought in in Interstate Commerce.)

To this may be added the cogent reasoning of Judge Parker in an opinion of a Three-Judge Court in *Eastern Air Transport, Inc.*, v. *Query et al.*, — Fed. —. Herein the constitutionality of the South Carolina Gasoline Act of 1929 was considered. The Statutory Court held that it was a tax on the sale of gasoline. Complainant contended that the Supreme Court of South Carolina had held in the instant case—the Gregg case—that the tax was passed on to the consumer, and that this fact made the tax one on the *use* of the gasoline, and brought the matter directly under the principle of *The Helson* v. *Kentucky*, 279 U. S. 245 (the Ferryboat case). The Court held to the contrary, holding that the fact that the consumer might eventually pay the tax, did not legally change its nature from a tax on sales to one on use.

Hence, we submit that the question of who bears the tax cannot legally be said to change the nature of the tax, and to sweep aside the serious objection that South Carolina is attempting to tax some gasoline as to sales, and some as to importation and storage, and to allow some which is imported into the State and stored to go free of any taxation, and to allow some which is manufactured in the State and stored therein and exported to go free of taxation.

Besides all of this, it cannot be said legally that all sales taxes are necessarily borne by the consumer. There has recently appeared in the Chicago Tribune—see page 11, Literary Digest, November 7, 1931—an interesting article upon the proposed Selective Sales Tax, which is to be presented to Congress, in which article it is predicted that, at least as to the smaller of such proposed sale taxes, the tax will "be absorbed by the manufacturer without increasing the cost to the consumer." Again, it is entirely conceivable that even with larger taxes, that in times of prosperity, which we so confidently look forward to, that competition between dealers may become so keen that the dealer may absorb the tax; and, even in times of deep depression, in order to sell its produce at all, that the dealer may be forced to bear the tax.

(2) Further, we sharply challenge the postulate that in passing upon the constitutionality of a statute another statute may be read into it, or that the existence of another statute may be used to complement it or to bolster it up. We submit that to stand the test of constitutionality, the statute must be constitutional within its four corners. We wish to state after a most exhaustive search of the authorities, and after correspondence with the nation-wide law publishers, that no case has been found which holds that in testing constitutionality recourse may be had to other statutes (except, of course, the Florida case, which is but a sister case to the present one).

Multitudes of authorities are found which state that recourse may be had to other statutes where a statute

is ambiguous in aid of statutory construction, and here the matter ends. The Gasoline Tax Act of 1930 is in no sense ambiguous. Its terms are plain. It taxes only gasoline brought into the State in Interstate Commerce.

The Supreme Courts of South Carolina and of Florida cite many authorities as confirming their thought that, in testing constitutionality, resort may be had to other statutes. We have carefully examined each of these decisions. We do not lengthen this argument by quoting from these decisions, but we assert that in each and every one of them the question involved was merely one of statutory construction and not of constitutionality.

Opposed to this, we find an indication of an opinion to the contrary in the opinion of this Court in *Heisler v. Colliery Company*, 260 U. S. 259, wherein a tax on anthracite coal was attacked on the ground of its constitutionality as against the Commerce Clause of the Federal Constitution. The Attorneys General of nine States joined in the litigation upon the ground that the intention of the Taxing Act as declared by the Governor of the State of Pennsylvania was to levy a tribute upon other states which were dependent upon the State of Pennsylvania for anthracite coal. This Court said:

> "Whether any statute or action of a state infringes upon Interstate Commerce, *depends upon the statute and action, and not what is said about it or the motive which impelled it.*" (Italics added.)

We further cite excerpts from two state decisions, to wit:

Los Angeles v. *Lewis*, 175 Cal. 777-781:

The Court, in considering a question of constitutionality, said:

> "No court in its effort to save a law can properly pervert or destroy its plain meaning * * *. Where the meaning is plain, words cannot be read into it or out of it for that purpose."

Rogers-Ruger Company v. *Murray*, 95 A. S. R. 901-903,

in which the Court was urged in order to save the constitutionality of an act, to place upon it a construction which the Legislature probably meant should be placed upon it. The Court said:

> "This Court can only construe. It cannot legislate. Words should not be read into or read out of a plain statute."

We submit that the foregoing authorities, at least, establish the fact that in considering the constitutionality of an action, that the freedom which exists in construing ambiguous statutes does not exist, and that the tendency of the courts has been what the rule should be, that a statute when tested as to its constitutionality must stand or fall upon its own terms.

The exceeding danger of promulgating the principle that a statute unconstitutional upon its face may be considered as constitutional because it is complemented or bolstered up by another statute, is apparent when the question is asked as to what the situation

would be should the Legislature of the State in question later repeal the supporting statute.

(3) The Supreme Court of South Carolina further stated (R. 31) that the statute (Acts of 1929, p. 107) required the Standard Oil Company to "pay a tax of six cents on all of its product sold in South Carolina or used or consumed in its business," evidently referring to the operation of its delivery trucks. We submitted that this additional reason interpolated into its opinion by the Court is erroneous for the reason that the Act provides for a license tax "graduated in accordance with volume of sales." The Court's construction of the Act of 1929 is not, we submit, binding on this Court as that Act was not directly before the Court. Hence, we submit, we have another class of gasoline which is not by statute taxed in South Carolina.

For all of these reasons we submit that the Acts of 1925 and 1929 may not be said to complement and bolster up the Act of 1930, which we submit in itself is clearly unconstitutional.

Respectfully submitted,

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